REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 16 OF 2016

MARTHA WAMBUI WARIA.....APPLICANT

VERSUS

MOSES NDUNGU WARIA.....RESPONDENT

RULING

By a motion dated 9th of August 2017, the applicant has sought several orders of which I find the principal ones to be that this honourable court be pleased to stay the execution of the decree or order issued in the suit on 19th June, 2017 and the subsequent taxation of the respondent's bill of costs that was then slated for 11th September, 2017 pending the hearing and determination of this application; the orders of this honourable court issued on 19 June 2017 dismissing the applicant sought for want of prosecution be reviewed or set aside; the applicant's suit be reinstated for hearing; and, finally this honourable court be pleased to stay the proceedings in Nyeri Environment and Land Court Civil Case No. 130 of 2017 in which the respondent is seeking the latter's conviction pending the hearing and the determination of this application and the entire suit.

The legal basis of the motion is stated to sections 1A, 1B and 3A of the Civil Procedure Act and a plethora of Rules under that Act together with certain provisions of the Constitution. In particular, the applicant has invoked Order 7 Rule 6; Order 12, Rule7; Order 39 Rules 1,2,2A (1) and3; Order 45 Rules 1 and 2; order 50 Rule 5; and, Order 51 of the Civil Procedure Rules. As far as the Constitution is concerned, she cited articles 40 (1), 40(3), 47, 48, 50(1), 57, 60(1) (f) and 159.

The motion is supported by the applicant's affidavit sworn on 9th August 2017 in which she has deposed that her suit was dismissed for non-attendance or want of prosecution on 19th June, 2017. According to the applicant, her previous counsel on record failed to attend court on the material date because she was mistaken as to the hearing date. It is her case that failure to attend court on part of her counsel was not deliberate but was inadvertent and a bona fide mistake. This mistake, so the applicant swore, should not be visited on her and she should be given an opportunity to prosecute her suit to its logical conclusion. According to her, it is only meet and just that she should have a chance to be heard before she is condemned.

The applicant also swore that as result of the dismissal of her suit, the respondent has not only filed a bill of costs for party and party costs against her but that he has also instituted a suit in the Environment and Land Court in Nyeri being Civil Suit No. 130 of 2017 to evict her from her matrimonial home on LR No. Tetu/Muthua-ini/292 which is the subject matter in her suit. Consequently, she is faced with the danger of eviction from her matrimonial and attachment of property or committal to civil jail in execution of the court decree against her.

The respondent, on the other hand, opposed the motion and in his replying affidavit sworn on 19th September, 2017 he deposed that before the applicants suit was dismissed for want of prosecution, she had never taken the initiative to have it heard any way despite the fact that that it was filed way back in the year 2013. It is as a result of this apparent lethargy that he instructed his advocate to file the application to have the suit dismissed for want of prosecution. Indeed a motion for this purpose dated 2nd April, 2015 was filed in court on 7th April, 2015 and was served to the applicant's counsel as early as 8th May, 2015.

It is this motion that was allowed on 19th June, 2016 when neither the applicant nor her counsel appeared in court even though they had been duly served with the hearing notice. The application by the applicant, according to the respondent is not in good faith because it was only filed after the respondent served her with his bill of costs. Nevertheless, the applicant deposed that should the court be inclined to allow the applicant's application and set aside its order of 19th June, 2016 it should, by the same token, subject the applicant to strict timelines to prosecute her suit.

It is not in dispute that the applicant's counsel then on record was served with the notice for the hearing of the respondent's motion dated 2nd April, 2015; it is also not in dispute that neither the applicant nor her representative appeared in court on 19th June, 2017 when the respondent's motion was scheduled for hearing. The explanation given for their absence is that the learned counsel was mistaken as to the

hearing date and such mistake should not be visited on her.

I understand the respondent to be saying, on the other hand, that even if the applicant's motion is allowed, the applicant is not enthusiastic about prosecuting her case and it is for this reason that he has asked this honourable court to impose strict timeliness on the applicant to conclude her suit should her application be allowed.

The record shows that the applicant opposed the respondent's motion dated 2nd April, 2015 and had filed a replying affidavit to that effect. A causal perusal of that affidavit shows that the applicant attempted to give the reasons for the delay in the prosecution of her suit. Whether the reasons given are sufficient or, to be specific, whether the respondent's motion itself had any merit is an issue that ought to have been determined in the context of that motion. For our present purposes, it is sufficient to note that, at the very least, the applicant had responded to the motion. This, in itself demonstrates that she was prepared to defend her position as far as the apparent delay in prosecution of her suit is concerned but for the failure to attend court by her counsel.

While I appreciate the applicant's position that failure to attend court by her advocate was not deliberate and could be explained, I must point out that it is not in every case that an applicant will have his way in matters such as the present one where a mistake is attributable, not to the party himself but to his advocate. It must be understood that once counsel is entrusted with a brief, it is his responsibility to ensure that he represents his client diligently, to the best of his ability and at any rate, professionally. Laxity in execution of his mandate which eventually exposes his client to any sort of loss or damage ultimately exposes the counsel himself to a claim in negligence. It is this latter course that ought to be taken by the aggrieved party rather seek to delay the innocent party from enjoying the fruits of his judgment and thereby punish him unduly.

It is for this reason that I would have been prepared to dismiss the applicant's application because it has not been explained to my satisfaction how the learned counsel for the applicant was mistaken as to the correct hearing date. More so, it is apparent that both the previous and the present counsel for the applicant are employees of the same organisation. However, I will not take that route for the simple reason the respondent has indicated that he is ready to accommodate the applicant as long as she can prosecute her suit within set timelines. I find this position to be reasonable and for this reason I will allow the applicant's motion to the extent that the order allowing the respondent's motion dated 2nd April, 2015 is vacated or set aside. In view of the respondent's depositions, it will not serve any useful purpose to have that motion heard inter partes; it is instead compromised in the following terms:

(a) Subject to compliance with Order 11 of the Civil Procedure Rules, the applicant is directed to set down this suit for hearing within 60 days from the date hereof and in default the suit stands dismissed with costs;

(b) In view of (a) above and for avoidance of doubt;

(i) The order of 19th June, 2017 allowing the respondent's motion dated 2nd April, 2015 is hereby vacated;

(ii) Any proceedings taken on the basis of the order made on 19th June, 2017 including the execution proceedings against the applicant are hereby stayed.

(c) The respondent shall have thrown away costs of Kshs 10,000.00 for his application dated 2nd April, 2015 and the applicant's motion dated 9th August, 2017.

Orders accordingly.

Dated, signed and delivered in open court this 18th May, 2018

Ngaah Jairus

JUDGE